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No. 09-49

Supreme Court, U.S.
FILED
OCT 8 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PAVEL IVANOVICH LAZARENKO,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DENNIS RIORDAN*
DONALD HORGAN
TED SAMPSELL JONES
RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102
(415) 431-3472

Attorneys for Petitioner Pavel Lazarenko

**Counsel of Record*

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The government suggests that this Court should deny certiorari because, based on its reversal of the petitioner's other convictions, the Ninth Circuit remanded the case for resentencing. It cites authority showing that Lazarenko could seek certiorari for the currently presented issues after sentencing is completed. (Govt. Opp. at 8-9.)

It is true that petitioner could seek certiorari at the later stage, and that this Court could decline to grant certiorari until that later stage. But an option is not a mandate. Nothing cited by the government suggests that this petition is unripe or that this Court lacks the power to grant it at this stage in the proceedings. This Court, for example, regularly reviews nonfinal decisions "where the petitioner's position, if sustained, would render the decision wholly void" or where review would "serve to hasten or finally resolve the litigation." E. Gressman et al., *Supreme Court Practice* § 4.18 at 282 (9th ed. 2007) (*citing, inter alia*, *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372 (1893), and *F. Hoffman-La Roche Ltd. v. Empagram S.A.*, 542 U.S. 155 (2004)). In this case, if petitioner's position is correct, it makes sense, from the standpoint of efficiency, for this Court to declare so now.

Moreover, unlike cases such as *VMI v. United States*, 508 U.S. 946 (1993), the nature of the issues on remand have nothing to do with the issues here

presented. Any alteration in the petitioner's sentence will not affect the merits of the two questions on which certiorari is sought. Thus, while this Court certainly has the power to defer these questions, nothing would be gained by doing so in this case.

2. Certiorari is warranted so that this Court can determine whether the failure to allege an element of an offense in an indictment can constitute harmless error. The government does not deny that the question has split the circuits. Nor does it deny that it is a question of extraordinary importance. Of course, it could not contest these claims, since the government itself sought certiorari on the very same question just a few years ago.

Instead, the government argues that this Court should not grant certiorari because this case does not squarely present the question presented. That argument rests on a series of evasions.

First, the government notes that the Ninth Circuit, in its ruling below, held that the indictment "was legally sufficient." *United States v. Lazarenko*, 564 F.3d 1026, 1034 (9th Cir. 2009). But the Ninth Circuit did not find the indictment to be sufficient because it actually alleged the element – rather, it found the indictment sufficient in large part because it contained enough other information that the defendant would not have been misled about the nature of the charges, and because the petit jury was ultimately instructed on the missing element. *Id.* at 1033-34.

Admittedly, the precise basis for the Ninth Circuit's holding is not easy to discern. Its rationale for denying the petitioner's pleading argument was somewhat muddled. But a lower court should not be able to evade review simply by masking its holding in a series of confusing, competing rationales. And in any event, the stated rationale of the court below entails the conclusion that the omission of an element can be harmless. The Ninth Circuit found it "significant," for example, that the petit jury was instructed on the elements missing from the indictment. *Id.* at 1034. But the only possible way that fact can be significant is that it arguably goes to harmlessness. If the Ninth Circuit had in fact concluded that the indictment already contained all of the essential elements, then any analysis of the petit jury instructions would have been entirely irrelevant.

The government's second evasion involves knocking down a straw man. It argues that a money laundering charge need not allege all of the elements of the predicate offense. (Govt. Opp. at 12.) It made the same argument below, and its argument was accepted by the Ninth Circuit. But the petitioner has never argued that the indictment was defective for failing to set forth *each underlying element* of the predicate offense. His argument is simpler and narrower: The indictment was defective for failing to specify the predicate offense *at all*.

Of great importance, in another context the government has agreed with Lazarenko that the indictment below did not charge extortion as an element

of the money laundering charges. Lazarenko's petition here noted that in a second appeal arising from this prosecution now pending in the Ninth Circuit, the government has joined Lazarenko in opposing a $19 million restitution award granted to Peter Kiritchenko, the alleged victim of the extortion upon which the money laundering charges rested. (*See* Brief of the United States as Appellee in Ninth Circuit Case No. 08-10185.) The government's brief in the restitution appeal asserts that Lazarenko was not even charged with, or convicted of, the extortion of Kiritchenko. (*Id.* at 2; *see also id.* at 25 ["the specified unlawful activity of which Kiritchenko was a victim, *i.e.*, extortion, was not charged in the indictment as a separate offense [and] is not an element of the money laundering offenses . . . "].)

Lazarenko's argument is a syllogism. The major premise, drawn from this Court's jurisprudence, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is simply that every fact necessary to the imposition of punishment is an element, and thus must be found by both the grand jury and the petit jury. The minor premise is that when the conduct constituting a money laundering predicate is committed on foreign soil, that conduct must constitute a foreign crime – it must be illegal in the jurisdiction where the conduct takes place. From these two premises flows a conclusion that both the grand jury and the petit jury must find a foreign crime.

Both the government and the Ninth Circuit below have employed evasive rhetoric to avoid addressing the

syllogism, but neither has actually offered a valid reason for denying either premise or the conclusion. And of course, neither the government nor the Ninth Circuit has denied that in this case, the grand jury never found a foreign crime. The only real question is whether the absence of that finding matters – whether it can be held harmless. It is, as this Court has already recognized, a question of extraordinary importance, and it is a question that is squarely presented by this case.

3. Petitioner also seeks certiorari to review the Ninth Circuit's interpretation of the term "extortion" in the money laundering statute. The government argues that it does not much matter if the Ninth Circuit was wrong, because the statute has now been amended to include bribery. (Govt. Opp. at 14.)

The question presented is exceptionally important not because the Ninth Circuit reached the wrong conclusion about the specific issue presented. Rather, the importance lies in the faulty analysis used by the Ninth Circuit to reach its conclusion. The Ninth Circuit's methodology did violence to the usual canons of statutory interpretation and, more importantly, to the fair warning requirement. The fair warning requirement, which includes both the void-for-vagueness doctrine and the rule of lenity, is grounded in the Ex Post Facto Clause and the Due Process Clause. *See United States v. Lanier*, 520 U.S. 259, 266-67 (1997). For each of the separate doctrinal manifestations of the fair warning requirement, the ultimate "touchstone is whether the statute, either

standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267.

During the late twentieth century, the fair warning requirement fell into a state of virtual desuetude. *See* Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 583 (1990) (suggesting that most judges do not "do much more than purport to" apply the rule of lenity). That development was of course welcomed by the government. But in just the last few years, the fair warning requirement has shown a renewed vitality as this Court has recognized its critical constitutional significance. *See, e.g., United States v. Santos*, 128 S. Ct. 2020 (2008); *Begay v. United States*, 128 S. Ct. 1581, 1588 (2008) (Scalia, J., concurring); *see also Weyhrauch v. United States*, 129 S. Ct. 2863 (2009) (granting certiorari to determine the scope of the federal "honest services" fraud statute).

What is at stake in this case is not the pre-2001 meaning of the money laundering statute. What is at stake is the meaning of the fair warning requirement. In this case, the Department of Justice itself previously maintained that the statute did not cover the charged conduct at the relevant time. The legislative history of the 2001 amendment makes clear that Congress took the same view. And yet now the Ninth Circuit has held, based solely on this Court's interpretation of the term "extortion" in the Hobbs Act, that a contrary view can be applied retroactively to the petitioner's conduct. The implication is that a

person may be put in prison for making a "mistaken" interpretation that was shared by both the federal executive and legislative branches. If the fair warning requirement is to have any meaning, such a criminal conviction cannot be allowed to stand.

CONCLUSION

For the reasons stated and in the petition, certiorari should be granted on either or both of the important questions discussed in Sections 2 and 3 above.

Dated: October 8, 2009

Respectfully Submitted,

DENNIS RIORDAN
DONALD HORGAN
TED SAMPSELL JONES
Attorneys for Petitioner